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No. 96-779

In the

Supreme Court of the United States

October Term, 1996

ARKANSAS EDUCATIONAL TELEVISION COMMISSION, et al.,
Petitioner,

v.

RALPH P. FORBES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF AFFIRMANCE

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IDENTITY AND INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of affirmance.[1] All parties have consented to the filing of this amicus brief. The letters of consent have been lodged with the Clerk of this Court.

Pacific Legal Foundation is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. Policy is set by a Board of Trustees composed of concerned citizens, many of whom are attorneys. PLF's Board evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community. PLF's Board has authorized the filing of a brief amicus curiae in this matter.

Pacific Legal Foundation is submitting this brief because it believes its public policy perspective and litigation experience in the First Amendment freedom of speech arena will provide an additional viewpoint with respect to the issues presented. PLF attorneys have participated in numerous other cases before this Court including *Keller v. State Bar of California*, 496 U.S. 1 (1990), *Glickman v. Wileman Brothers & Elliott*, Docket No. 95-1184 (decided June 25, 1997), *U.S. Term Limits v. Thornton*, 514 U.S. 779 (1995), and *Rosenberger v. Rector and Visitors of University of Virginia*, __ U.S. __, 115 S. Ct. 2510 (1995).

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[1] Pursuant to Supreme Court Rule 37.6, amicus curiae Pacific Legal Foundation affirms that no counsel for any party in this case authored this brief in whole or in part; and furthermore, that no person or entity has made a monetary contribution specifically for the preparation or submission of this brief.

PLF believes that America was founded on principles of open political discourse and opportunity. These principles are furthered by the existence of third, minor political parties which challenge, and hold the potential to supplant, the two major parties. Policies developed by third parties have made their way into the mainstream over time. Moreover, third parties provide an outlet for those individuals whose beliefs are not represented adequately by the major pa.ties. Thus, third parties provide a mechanism to keep potentially disaffected and withdrawn Americans within the political process. PLF also believes, however, that no candidate, belonging to a major or minor party, is entitled to governmental benefits to pursue his or her candidacy.

OPINION BELOW

The opinion of the Eighth Circuit Court of Appeals, holding that governmental exclusion of an independent, qualified, candidate from a state-sponsored political debate violates the First Amendment freedom of speech, is reported at *Forbes v. Arkansas Educational Television Commission*, 93 F.3d 497 (8th Cir. 1996).

STATEMENT OF THE CASE

Ralph P. Forbes was a legally qualified independent candidate for the Third Congressional District in Arkansas in 1992. *Forbes*, 93 F.3d at 500. Two weeks prior to the November, 1992, election, state-sponsored Arkansas Educational Television Network (AETN) held a debate between the Republican and Democratic candidates for the Third Congressional District. *Id.* Although Mr. Forbes asked to be included in the debate, AETN refused and conducted the

debate without Mr. Forbes' participation. *Id.* Mr. Forbes sued in federal District Court, alleging violations of the Civil Rights Act and the First Amendment to the United States Constitution. His motion for a preliminary injunction to be included in the debate was denied and, upon AETN's motion after the debate, the District Court dismissed the complaint on December 16, 1992. The Eighth Circuit Court of Appeals, in an *en banc* decision, reversed the District Court decision ruling that Mr. Forbes had alleged a First Amendment violation sufficient to defeat a motion to dismiss. *Forbes v. Arkansas Educational Television Communication Network Foundation*, 22 F.3d 1423, 1428 (8th Cir.), *cert. denied*, 513 U.S. 995 (1994).

The District Court conducted a trial on Mr. Forbes' claims and entered judgment in favor of AETN on June 7, 1995. The Eighth Circuit Court of Appeals again reversed the District Court on August 21, 1996. *Forbes*, 93 F.3d 497. The court held that

> a governmentally owned and controlled television station may not exclude a candidate, legally qualified under state law, from a debate organized by it on such a subjective ground [that he was not a "viable" candidate]. To uphold such a defense would, in our view, place too much faith in government.

Id. at 500. AETN petitioned this Court for a writ of certiorari on November 19, 1996, which was granted on March 17, 1997.

SUMMARY OF ARGUMENT

The case presents this Court with a First Amendment claim highlighting the tension between a state-sponsored television station's duty to provide equal access in its debates

to all legally qualified candidates and the potential consequence of establishing a constitutional entitlement to public broadcast time. If this Court determines that public broadcasting may legitimately provide aid to political candidates by disseminating candidates' messages through a debate forum, the necessary corollary is that the state may not discriminate among the legally qualified candidates when determining who may be included in the debate. Third parties have proven to be an important force in American politics throughout history, and their exclusion from the single most effective way to address voters harms the political process. However, nondiscrimination would most appropriately take the form of declining to provide any state resource, whether it be cash or air time, to *any* candidate, thus avoiding the potential of creating an "entitlement" to public resources.

ARGUMENT

I

THIS COURT'S DECISION IN TIMMONS V. TWIN CITIES AREA NEW PARTY SHOULD NOT BE INTERPRETED TO PERMIT OUTRIGHT DISCRIMINATION BY GOVERNMENT AGAINST THIRD PARTIES AND INDEPENDENT CANDIDATES

In *Timmons v. Twin Cities Area New Party*, __ U.S. __, 117 S. Ct. 1364, 1374 (1997), this Court held that election regulations which, in practice, favor the two major parties are not unconstitutional on that basis. The issue in *Timmons* was Minnesota's ban on "fusion" candidacies for elective office. The ban prohibits a candidate from appearing on the ballot as the candidate of more than one party. *Id.* at 1367. The Court upheld the ban against a First and Fourteenth Amendment

challenge on the grounds that the state's interest in preserving political stability (*e.g.*, the two-party system) outweighed the infringement on the rights of New Party members and candidates. *Id.* at 1375.

While the court recognized that a state may not "completely insulate the two party system from minor parties' or independent candidates' competition and influence," *id.* at 1374, the court went on to hold that a state has the power to decide that "political stability is best served through a healthy two party system." *Id.* The court has thus identified a tension between its jurisprudence which forbids a freezing of the status quo (*e.g.*, *Jenness v. Fortson*, 403 U.S. 431, 439 (1971)) and case law permitting the state to favor the political parties currently in power. *Timmons* tipped the balance in favor of the major parties who seek to perpetuate their power.

While it is true that the two-party form of government provides a certain stability, this holding proves too much. After all, a one-party form of government--a dictatorship--may be the ultimate in stability--at least so long as the dictator lives. "Stability" often comes at the price of freedom. Third parties prevent Democrats and Republicans from irrevocably institutionalizing themselves as the only options with which voters are presented. Thus, it is the *existence* of third parties, rather than their electoral success, in which their value lies. In this case, this Court has the opportunity to revive the hopes of third party partisans. This Court should recognize that if the state is going to provide resources to candidates, the state does not have the option of picking and choosing which candidates it will support .

This Court in *Timmons* argued that the two parties, with their wide-ranging approaches to policy and internal coalition building, cover most of the American political spectrum. *Timmons*, 117 S. Ct. at 1374. Despite the best efforts of the

major parties, however, third parties and independent candidates have not disappeared. From the Socialist Party to the Libertarian Party to the newly formed Reform Party, third parties represent the views of a significant minority of American voters. Third parties' important and beneficial impact on the major parties and on American policy should not be destroyed by the state. As shown below, the entry of minor candidates into a normal two-party electoral contest can influence the outcome of the election in any of three distinct ways: by influencing who turns out to vote, by altering individual voters' preferences for candidates, or by splitting one or more of the major candidates' vote. G. Mauser, POLITICAL MARKETING: AN APPROACH TO CAMPAIGN STRATEGY 113 (1983). Nonetheless, as a practical matter the two major parties run the state and, in this case, are using state resources (air time) to maintain the parties' positions of power.

The *Timmons* rationale should not be employed in this case to create a rule allowing the state to discriminate against third parties. Through policy innovation and the potential to influence the electoral outcome, through their assurance that major parties will be held accountable and that disaffection with the two-party structure will be channeled into voter participation rather than a rejection of the political process, third-party and independent candidates play a vital role in the American political process. It is important to note that this role is independent of electoral success. By expanding the political dialogue, the participation of third party candidates in state-sponsored debates continues to perform their traditional role. Eisner, *Non-major-party Candidates and Televised Presidential Debates: the Merits of Legislative Inclusion*, 141 U. PA. L. REV. 973, 979-80 (1993) (Eisner). Contrary to the implicit denials in *Timmons*, third parties and independent candidates add value to the American political system and should not be cast aside to increase the fortunes of the two major parties.

A. Third Parties Have Enjoyed a Meaningful Role in American Politics Since Nearly the Founding of the Republic

The two major parties, the Republican Party and the Democratic Party, have never been the exclusive voices for Americans. Some third parties essentially have been doctrinaire or ideological (*e.g.*, the American Communist Party, the Socialist Party, and the Libertarian Party). Kruschke, ENCYCLOPEDIA OF THIRD PARTIES IN THE UNITED STATES 2 (1991) (Kruschke). Other parties, such as the Progressives of 1912, and the States' Rights, or "Dixiecrat," Party of 1948, split off from one of the major parties for reasons of dissatisfaction of one kind or another. Other examples of this type of party would include the La Follette Progressives of 1924, the Henry Wallace Progressives of 1948, and the George Wallace American Independent Party of 1968. *Id.* at 3. Other parties sought to gain a public forum for their philosophical viewpoints, usually on a single issue. These parties include the Vegetarian Party, the Prohibition Party, the Free Soil Party, the Anti-Masonic Party, and the Know-Nothings, a nativist, anti-Catholic, and anti-Irish party especially vocal during the 1850s. *Id.*

Over the years, the success of third parties has largely depended on the existence of an issue that produced extreme internal divisions within the two major parties. The most successful third party in the history of the United States came into existence at the time of the greatest crisis ever faced by the nation. The Republican Party began in 1854 as a third party that strongly supported the northern abolitionist movement. The two major parties at that time, the Democrats and the Whigs, were sharply divided along regional lines over the issues of slavery and states' rights. The Republicans aggressively campaigned in the mid-term congressional elections held in November of that year. They won not a

majority but a plurality of seats in all contested races against Democrats, Whigs, and candidates from a few other minor parties, such as the Freesoilers and Liberty Party. During the late 1850s, the Whig Party collapsed; its members joined either the Republican, Democratic, or Constitutional Union parties. S. Rosenstone, R. Behe, and E. Lazarus, THIRD PARTIES IN AMERICA 56 (1996) (Rosenstone). In 1860, Abraham Lincoln was elected the first Republican president of the United States.

At its 1860 convention, the Democratic Party saw its southern delegates walk out and form a new party, the National Democratic Party, which in turn nominated John Breckinridge, a pro-slavery candidate, for president. *Id.* at 60. The Republican Party, in only its second attempt at fielding a national candidate, managed to win 40% of the popular vote due in large part to the solid support of the northern abolitionists. However, this 40% allowed the Republicans to carry all of the northern and western states and, thanks to the winner-take-all method of calculating electoral college votes, 59% of the electoral college votes. D. Mazmanian, THIRD PARTIES IN PRESIDENTIAL ELECTIONS 56 (1974) (Mazmanian); Anderson and Freeman, *Taking the First Steps Towards A Multiparty System in the United States*, 21 FLETCHER FORUM OF WORLD AFFAIRS 73, 80 (1997) (*First Steps*). After the Civil War, the traditional two-party system revived, featuring the Democrats and the Republicans. These two parties did not face another major challenge until Theodore Roosevelt ran as the candidate for the Progressive, or Bull Moose, Party, in 1912. *First Steps*, 21 FLETCHER FORUM OF WORLD AFFAIRS at 75-76.

In 1912, the country faced continuing crises caused by growing economic disparities among the population. The political parties were still coping with the nation's industrialization and the changing role of government in the regulation of private enterprise. The Democratic Party

nominated reformer Woodrow Wilson and the incumbent Republican President, Howard Taft, engineered his renomination at the Convention through the use of back-room politics, alienating Teddy Roosevelt and the entire reform-minded wing of the Republican party. H. Nash, THIRD PARTIES IN AMERICAN POLITICS 252-56 (1959). This group became the core of Roosevelt's third-party candidacy as a "Progressive." With his proposals for greater government oversight of business, Roosevelt was able to take second place behind Wilson and ahead of Taft. However, due to a lack of foundational support and Roosevelt's own lack of interest, the Progressive Party faded after the 1912 election. The reforms instituted by the Wilson administration seemed to win over many of the Progressive Party voters. E. Robinson, THE EVOLUTION OF AMERICAN POLITICAL PARTIES 335 (1924); *First Steps*, 21 FLETCHER FORUM OF WORLD AFFAIRS at 77.

The next major third-party intrusion into the two-party system was George Wallace's presidential bid under the banner of the American Independent Party. Wallace represented the minority of voters who favored continued segregation and a strong military solution in Vietnam. *First Steps*, 21 FLETCHER FORUM OF WORLD AFFAIRS at 76. He received 13% of the vote in the 1968 presidential election, but as his views came to represent fewer and fewer Americans, his party's viability decreased until it disappeared. In 1972, Wallace ran again as a Democrat, but his candidacy was abruptly terminated after an attempt on his life. *Id.* at 77.

Following Wallace, John Anderson was the nonmajor party candidate to obtain a large following. Anderson sought the Republican nomination for the presidency in 1980, but after losing in early primaries, declared himself an independent and continued to campaign. His independence was demonstrated by his stands on taxes, women's rights, and civil rights, which did

not fit neatly into Republican or Democratic molds. *Id.* In the end, Anderson received just under 7% of the votes cast. *Id.*

Most recently, of course, Ross Perot bankrolled not only his own candidacy for president in 1992 and 1996, but also the Reform Party. Capturing the imagination of a significant portion of the American electorate, Perot received 19% of the vote in 1992, and 8% in 1996. *Id.* at 78. While Perot's own pocketbook cannot be discounted as a factor in his popularity, the continued viability of the Reform Party (which has run candidates for other offices), demonstrates that the policy positions espoused by Perot reflected the beliefs of many people in a way the two major parties did not.

B. The Political Viability of Third Parties Has Ebbed and Flowed over the Years; but Political Events Demonstrate Substantial and Increasing Public Interest in Third Parties over the Past Fifteen Years

The earliest polls on third parties (appearing in Roper surveys in 1938 and 1944) show overwhelming support for and satisfaction with the two-party system. Collet, *Third Parties and the Two-Party System*, 60 PUBLIC OPINION QUARTERLY 431, 433 (1996) (Collet). Support for the current system continued to be strong into the 1960s--even as George Wallace emerged as an independent candidate and voters began to act more independently, in terms of self-identification and ticket splitting. *Id.* By the early eighties, however, the drop in support for the system began to be manifest, and by 1994, for the first time, only a minority of those asked said that they felt that the Republicans and Democrats were doing "an adequate job"; a majority felt there should "be a third party." *Id.*

In the 1990s, third parties have seen reasons to hope for greater electoral success.[2] First, approximately one-third of all Americans of voting age claim to have no party ties. P. Abramson, J. Aldrich, and D. Rohde, CHANGE AND CONTINUITY IN THE 1988 ELECTIONS 295 (1990). Second, and perhaps more important, only three adults in ten claim to be strongly committed to either of the two major parties. *Id.* Third, there are more than 80 million nonvoters, who, if brought to the polls, could transform any political movement into a majority party. *Id.* Given these trends, some third party candidates possibly could attain the "viability" AETN demands as a precondition to receiving state-subsidized air time. Nonetheless, "viability" is a tenuous concept which, left in the hands of the state, begs for arbitrary application and exclusion of any nonfavored candidate.

Timmons' assertion that the two-party system is necessary to political stability is belied by the increasing activity of third parties and independent candidates. The candidacies of George Wallace and John Anderson in the 1968 and 1980 presidential elections attracted some attention to the existent strains in the system, but Ross Perot's 19% showing in 1992 showed the cracks in the two-party armor. Collet at 431. Still, American politics remained stable and the major parties' desire to draw the "Perotistas" into their own folds shifted the debate to issues of interest to Perot's followers, such as the federal deficit.

Recent polls demonstrated the public's yearning for new ideas and greater choice in the political system. In 1995, a Los Angeles poll found that roughly half of the public consider the

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[2] Still, there is no denying that "many features of our political system--*e.g.*, single member districts, 'first past the post' elections, and the high costs of campaigning--make it difficult for third parties to succeed in American politics." *Timmons v. Twin Cities Area New Party*, 117 S. Ct. at 1371.

two-party system to be "unsound." Collet at 432. A 1995 NBC/*Wall Street Journal* poll found that 82% said the two-party system has either "real problems" or "is seriously broken." Collet at 433.

Moreover, the public is interested in having more candidates to choose from during election time. A *CBS/New York Times* survey in December, 1995, asked why individuals said they wanted a "new political party." Seventy-five percent said that it was because "having more [candidates] is better for the country," while only 16% said that it was because the two parties did not "produce good candidates." Another CBS/New York Times survey conducted in April, 1996, showed a plurality (48%) agreeing that "having only two parties can't provide voters with enough options." Collet at 434.

While the poll data have not translated into certain electoral success for third parties and independent candidates, success has not been entirely elusive either. Socialist Party candidates have been elected mayors in Bridgeport and Hartford, Connecticut, and Milwaukee, Wisconsin. Voters have also elected Socialist candidates to the United States House of Representatives from Milwaukee (Victor Berger, 1911-13, 1923-29) and Manhattan (Meyer London, 1915-23). Vermont has elected Socialist Bernard Sanders to the United States Senate since 1990. M. Barone and G. Ujifusa, ALMANAC OF AMERICAN POLITICS 1296 (1994). The Farmer-Labor Party has been especially successful in Minnesota, particularly during the 1920s and 1930s. It even won the governorship of that state in the 1940s. In New York, Conservative Party candidate James Buckley was elected to the United States Senate. Kruschke at 3.

C. Third Parties Have Been the Source of Numerous Innovations That Transformed American Policy

The most obvious and concrete role third parties serve is that of policy innovators. The direct election of senators, women's suffrage, and the graduated income tax were all issues first espoused by third parties (Rosenstone at 8), as were the ideas of initiative, referendum, and recall (Kruschke at 8), and railroad regulation, high standards for civil service, and the encouragement of both labor unions and cooperatives (L. Mitchell, WITH THE NATION WATCHING: REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON TELEVISED PRESIDENTIAL DEBATES 84 (1979); Eisner, 141 U. PA. L. REV. at 983). *See also Anderson v. Celebrezze*, 460 U.S. 780, 794 (1983) ("Historically political figures outside the two major parties have been fertile sources of new ideas and new programs; many of their challenges to the status quo have in time made their way into the political mainstream.").

> [National] campaigns [in our political system] serve other purposes besides electing particular candidates to office. They are also used to educate the public, to advance unpopular ideas, and to protest the political order, even if the particular candidates has little hope of election.

Common Cause v. Bolger, 512 F. Supp. 26, 32 (D.D.C. 1980), *aff'd*, 461 U.S. 911 (1983).

> All political ideas cannot and should not be channeled into the programs of our two major parties. History has amply proved the virtue of political activity by minority, dissident groups, who innumerable times have been in the vanguard of democratic thought and whose programs were

> ultimately accepted. Mere orthodoxy or dissent from the prevailing mores is not to be condemned. The absence of such voices would be a symptom of grave illness in our society.

Sweezy v. New Hampshire, 354 U.S. 234, 250-51 (1957).

Controversy is sometimes shunned by the major parties; certain topics (*e.g.*, dealing with the budget deficit, "liberal" versus "conservative" approaches to government, the question of the necessity of increasing taxes) are often avoided or completely ignored until it becomes absolutely necessary, from a political perspective, to deal with them. Then the minor parties, or minor candidates, see their ideas placed on the public agenda. "[M]ajor portions of the New Deal programs of Franklin Roosevelt are ... attributed to the Progressive platforms of the preceding decades." Mazmanian at 81. Those third parties that have been the most long-lasting have been those with an enduring philosophical or ideological foundation largely inconsistent with attitudes held by the majority of Americans. Thus, it may be ideology that holds those at the fringes of society most closely together. Kruschke at 8-9. When Ross Perot first ran for the presidency in 1992, he argued that the major party candidates were not paying heed to the economic challenges facing the nation, in particular the huge and mounting federal deficit. His campaign rode a wave of voter contempt for career politicians and their perceived lack of responsiveness to voter concerns. While Perot did not prevail in his candidacy, he did help to determine and focus the issues that became central to the 1992 campaign. *First Steps*, 21 FLETCHER FORUM OF WORLD AFFAIRS at 78.

Ironically, the third party ideas that generally become enacted do so only after being embraced by one of the major parties. This co-optation exposes a cynical reality of two-party politics, it nonetheless dramatizes a key function of minor

parties: by raising issues that the major parties feel compelled to seize upon as their own, third parties serve as useful catalysts for policy change. Eisner, 141 U. PA. L. REV. at 985. If nothing else, minor parties provide a means of expression of "alternative" ideas and alternative policies for American government. Were it not for the existence of third parties, it is possible that even more Americans would abstain from voting. Kruschke at 8.

Thus, third parties keep the major parties accountable by helping to shape the programs Democrats and Republicans pursue while in office. Rosenstone at 222 (noting impact of George Wallace's candidacy on the Nixon Administration's civil rights policies). The full extent of the third-party role in shaping public policy is not always immediately apparent; third-party ideas often filter gradually into major-party programs. Mazmanian at 81. In many cases, however, the influence of third parties is more obvious and unmediated. *Id.* The nettlesome presence of minor parties, then, is a subtle inter-election goad to major parties, who adopt their positions not out of an altruistic desire to represent minority viewpoints, but to put third parties out of business. Rosenstone at 221; Eisner, 141 U. PA. L. REV. at 986.

D. Third Parties Provide an Outlet for Individuals Disaffected with Major Parties to Continue Their Participation in the Political Process

Third parties serve as conduits for the expression of discontent with the major parties. Rosenstone at 5-6, 215; Kruschke at 9. This role is crucial given the downward spiral in voter turnout in recent decades. Eisner, 141 U. PA. L. REV. at 986 and n.66 (citing Bureau of the Census, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1989 258 (109th ed. 1989) (Table 433 showing that the percentage of the voting age population casting presidential

ballots has consistently declined from 62.8% in 1960 to 50.2% in 1988)). By giving the disaffected a voice and a corresponding desire to take part in the political process, third parties encourage the electoral participation of the disenchanted and ensure that these marginal constituencies do not resort to less acceptable forms of protest, such as civil disobedience or withdrawal from the political process. Rosenstone at 224; Eisner, 141 U. PA. L. REV. at 986-87.

Thus, partisans of minor party candidates may perceive the state's exclusion of their candidates from political debate as tantamount to delegitimization. Rosenstone at 39. Debates "enhance support for the political system by legitimizing both nominees." D. Lanoue and P. Schrott, THE JOINT PRESS CONFERENCE: THE HISTORY, IMPACT, AND PROSPECTS OF AMERICAN PRESIDENTIAL DEBATES 105 (1991); Eisner, 141 U. PA. L. REV. at 998. The negative implication of this proposition is that a candidate who is not included in the debates cannot be legitimized. Absent legitimization--to say nothing of support--third parties will remain unable to influence the political agenda, raise important yet overlooked issues, or hold the major parties accountable. Rosenstone at 222; Eisner, 141 U. PA. L. REV. at 998. By excluding third-party candidates, the state makes a powerful statement to the candidate's supporters that such candidates do not matter. Inclusion of such candidates, on the other hand, would give minor-party candidates "the opportunity to overcome the widespread attitude that third-party candidacies are a waste of time." Barmann, *Third-Party Candidates and Presidential Debates: A Proposal to Increase Voter Participation in National Debates*, 23 COLUM. J. L. & SOC. PROBS. 441, 453 (1990).

For the reasons stated above, the state should show enough respect for the venerable third party tradition in this country to prevent the two major parties from rigging the rules

of the political process to perpetuate their own power, to the ultimate exclusion of third parties and independent candidates. Given this background, the court below correctly held that the state may not give governmental benefits to some legally qualified candidates for the purpose of furthering their campaign while excluding other equally legally qualified candidates. This Court should affirm the decision of the court below.

II

THIS COURT SHOULD HESITATE TO LINK THE RIGHTS OF THIRD PARTY CANDIDATES TO HAVE EQUAL ACCESS TO A PUBLIC FORUM TO AN ALLEGED RIGHT TO PUBLIC FUNDING OF POLITICAL DEBATES

The First Amendment's negative constraints on government that embody the traditional conception of "freedom of speech" have been instrumental in the achievement of the broadly participatory, relatively open, officially uncensored, debate which is the hallmark of American politics. This good result of the First Amendment, however, should not be mistaken as the principle embodied in "free speech." BeVier, *Campaign Finance Reform: Specious Arguments, Intractable Dilemmas*, 94 COLUM. L. REV. 1258, 1261 (1994). That is, it is not the function of the First Amendment to *ensure* the widest possible political debates. *Id.* Instead, the First Amendment ensures that the state has no power to *restrict* political debate. The First Amendment guarantee of "freedom of speech" is turned on its head when it permits or requires "government coercion, regulation, or even prohibition of speech in the name of 'enhancing freedom.'" *Id.* at 1277.

Expending public funds to promote political debates raises constitutional concerns regarding the rights of individuals

to refuse to subsidize the propagation of ideas with which they disagree. *Keller v. State Bar of California*, 496 U.S. at 14; *Abood v. Detroit Board of Education*, 431 U.S. 209, 235-36 (1977). In the context of agency shop fees, and mandatory bar dues, this Court has held compelled subsidization of speech to be as reprehensible as the prohibition of speech. In *Abood*, this Court stated:

> The fact that the appellants are compelled to make, rather than prohibited from making, contributions for political purposes works no less an infringement of their constitutional rights. For at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State.

Id. at 233-35 (footnotes omitted). In *Abood*, this Court held unconstitutional a mandatory agency shop fee paid to a teachers' union that spent the fee--over the fee payer's objection--on political and ideological activities unrelated to collective bargaining, contract administration, and grievance adjustment. *Id.* at 235-36. Similarly, in *Keller v. State Bar of California*, 496 U.S. 1, the Court declared that the California State Bar could not use a dissenter's mandatory bar dues for political and ideological activities unrelated to regulating the legal profession or improving the quality of legal services available to the people of the state. *Id.* at 14.

The constitutional concerns regarding compelled speech do not disappear simply because the taxpayer is the subject of the constitutional violation. On the contrary, because taxpayers can do little to prevent Congress from spending public funds in

violation of their First Amendment rights,[3] policy makers should do more to ensure that public expenditures protect taxpayers' liberty interests. In this case, the state's selective dissemination of chosen candidates' views distorts the political dialogue. Voters in Arkansas' Third Congressional District identified three candidates they deemed worthy of a place on the ballot. Two of those candidates, the candidates representing the major parties--and having the greatest stake in the status quo--should not be able to use tax dollars to further their own political ideas and ambitions, especially at the expense of the third candidate. Permitting the major party candidates to rally the state's resources around their campaigns implies the imprimatur of the state on their candidacies. Tax money should not be used to propagandize selected candidates' views.

For the foregoing reasons, this Court should decline to link the right to equal access to a limited public forum to any alleged right to public subsidization of political debates.

CONCLUSION

Third parties historically played and continue to play a significant role in American politics. Often third parties voiced dissenting views and made sufficient inroads at the polls to force the attention of the two major parties. Frequently third parties were the vehicles through which new ideas or policies were launched and tested. When a new proposal met a

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[3] This Court has held that taxpayers do not have standing to challenge the unconstitutional expenditure of public funds unless the expenditure arises under Congress' taxing and spending power or the Establishment Clause. *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 479-80 (1982).

favorable reception it was adopted by a major party. Third parties played a significant part in American political history--even in the maintenance of the traditional "two-party" system. W. Hasseltine, THIRD PARTY MOVEMENTS IN THE UNITED STATES 13-14 (1962).

Third party and independent candidates could pursue voters with relative ease in the days of handbills and personal appearances. The current political reality, however, is that candidates for public office representing an area the size of a congressional district must pursue voters through the medium of television. If the state sponsors television debates among the candidates for public office, the state must not discriminate against any legally qualified candidate. Exclusion from debate eliminates the most effective means for those candidates to address the voters.

While the state may not discriminate, this does not mean that the state is required to provide a debating forum for candidates. To the contrary, the candidates have no entitlement to a state subsidy in the form of free air time. In deciding this case, this Court must make clear that the state must not discriminate among candidates of equal qualifications who seek to participate in a state-sponsored debate; but, the state is under no obligation to provide the debating forum at all. As state

intrusion into the political process causes more distortion than if the process flows free of regulation or restrictions, this is amicus' preferred result.

For the reasons set forth above, the decision of the Eighth Circuit Court of Appeals should be affirmed.

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Respectfully submitted,

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